

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

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4 In re:

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6 LEHMAN BROTHERS HOLDINGS INC.,

7 Case No. 08-13555(SCC)

8 Debtor.

9 - - - - - x

10 In re:

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12 LEHMAN BROTHERS INC.

Adv. Case No. 08-01420(SCC)

13 - - - - - x

14

15 U.S. Bankruptcy Court

16 One Bowling Green

17 New York, New York

18

19 May 5, 2015

20 10:05 AM

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23 B E F O R E :

24 HON SHELLEY C. CHAPMAN

25 U.S. BANKRUPTCY JUDGE

1 Hearing re: Doc# 49172 Motion to Approve Compromise: Motion
2 pursuant to Rule 9019 of the Federal Rules of Bankruptcy
3 Procedure and Section 105(a) of the Bankruptcy Code for
4 Approval of Settlement Agreement Relating to restructured
5 Asset Certificates with Enhanced Returns, Series 2006-20AT
6 Credit Defaults Swap Agreement and Trust Agreement

7
8 Hearing re: Adv. 08-01420 - Doc# 7697 Trustee's One Hundred
9 Sixty-Third Omnibus Objection to General Creditor Claim (No
10 Liability Claims)

11
12 Hearing re: Doc# 49107 Motion to Vacate the "Alternative
13 Dispute Resolution Procedures Order for Indemnification
14 Claims of the Debtors against Mortgage Loan Seller, First
15 Mortgage Corporation, and Memorandum of Law in Support

16
17 Hearing re: Doc# 49112 Motion to Vacate the "Alternative
18 Dispute Resolution Procedures Order for Indemnification
19 Claims of the Debtors against Mortgage Loan Seller, Republic
20 State Mortgage Company, and Memorandum of Law in Support

21
22 Hearing re: Doc# 49106 Motion to Vacate the "Alternative
23 Dispute Resolution Procedures Order for Indemnification
24 Claims of the Debtors against Mortgage Loan Seller,
25 Directors Mortgage, Inc., and Memorandum of Law in Support

1 Hearing re: Doc# 48242 Motion to Vacate the "Alternative
2 Dispute Resolution Procedures Order for Indemnification
3 Claims of the Debtors against Mortgage Loan Seller, Stearns
4 Lending, LLC f/k/a Stearns Lending, Inc."

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6 Hearing re: Doc# 49167 Motion to Vacate the "Alternative
7 Dispute Resolution procedures Order for Indemnification
8 Claims of the Debtors against Mortgage Loan Seller, Apex
9 Home Loans, Inc."

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11 Hearing re: Doc# 49027 Motion to Vacate the "Alternative
12 Dispute Resolution procedures Order for Indemnification
13 Claims of the Debtors against Mortgage Loan Seller," as it
14 applies to Group 2000 Real Estate Services, Inc.

15

16 Hearing re: Doc# 49060 Motion to Vacate the "Alternative
17 Dispute Resolution procedures Order for Indemnification
18 Claims of the Debtors against Mortgage Loan Seller, Oaktree
19 Funding Corporation: Pursuant to Rule 60(b)(6) of the
20 Federal Rules of Civil Procedure and Memorandum of Law in
21 Support Thereof

22

23 Hearing re: Doc# 49064 Motion to Vacate the "Alternative
24 Dispute Resolution procedures Order for Indemnification
25 Claims of the Debtors against Mortgage Loan Seller, Gateway

1 Bank, FSB" Pursuant to Rule 60(b)(6) of the Federal Rules of
2 Civil Procedure and Memorandum of Law in Support Thereof

3
4 Hearing re: Doc# 49067 Motion to Vacate the "Alternative
5 Dispute Resolution procedures Order for Indemnification
6 Claims of the Debtors against Mortgage Loan Seller, American
7 Bank" Pursuant to Rule 60(b)(6) of the Federal Rules of
8 Civil Procedure and Memorandum of Law in Support Thereof

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25 Transcribed by: Dawn South

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7

8 ALSO PRESENT:

9 MATTHEW CANTOR

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1 P R O C E E D I N G S

2 THE CLERK: All rise.

3 THE COURT: Please have a seat. How is everyone
4 today? I see you brought the big guns today, Mr. Fail.

5 MR. FAIL: I did.

6 THE COURT: Well, good morning. This is the first
7 time that a Lehman hearing has been held since we lost
8 Harvey Miller, and I wanted to take a quick moment to
9 express our condolences to everyone at the Weil firm, and
10 indeed to hundreds of folks, if not thousands, around our
11 practice here in New York and elsewhere who had the gift of
12 working with Harvey and getting to know Harvey, and even
13 being on the opposite side as Harvey, because simply being
14 in his presence was a memorable experience.

15 This case of course was his largest, one that he
16 was extremely proud of, and was I think a little nervous
17 when it got handed over to me, and I assured him that I
18 would try my best to take good care of it and not mess it
19 up. The jury is still out on that one.

20 But we think about him every day as we think about
21 Judge Lifland. I think the two of them, and I know that my
22 colleagues share this view, they're truly irreplaceable.

23 There is -- there was and there is no one like
24 Harvey, at many, many levels, and he will be deeply missed.

25 And I know that the firm and those close to him

1 are planning a memorial service, so I won't go on at too
2 much length, but I did want to share with you that some
3 months ago when it was beginning to be known that he was not
4 well, although the reasons were not known, he reached out to
5 me in response to an expression of concern that I had
6 conveyed to him, and he wrote me a note, which I had the
7 sense would be the last time that I ever would have the
8 privilege of hearing from him, and the words with which he
9 closed I think are important, and they are, "Enjoy and
10 remember to laugh."

11 So for a man who approached everything that he did
12 with the most utmost seriousness and purpose and drive the
13 fact that he told me to remember to laugh was something I'll
14 always treasure.

15 So thank you for listening.

16 MR. FAIL: Good morning, Your Honor, Garrett Fail
17 of Weil, Gotshal & Manges.

18 On behalf of Harvey's wife, Ruth, his friends and
19 colleagues of Weil, and many others, thank you for your
20 recognition of Harvey this morning.

21 It is most appropriate to remember Harvey in this
22 court in the Lehman cases and with remarks from Your Honor
23 in particular. Your respect for Harvey was mutual.

24 As you noted earlier this year he wrote to you
25 about your tenor on the court and he said:

1 "Words actually fail me inadequately describing
2 the excellent quality of legal scholarship and judicial
3 temperament peppered with seeds of pragmatism.

4 You have, like your predecessors, elevated the
5 status and prestige of the bankruptcy bench of the Southern
6 District of New York.

7 I will miss the opportunity watch you in action,
8 but hope to continue to read of your exploits."

9 I know that he did and that he enjoyed doing so.

10 We all owe a debt of gratitude to Harvey and to
11 the legacy that he created and left for us to live up to.
12 He'll be sorely missed.

13 Your Honor, before turning to the agenda Matt
14 Cantor, chief general counsel of Lehman Brothers Holdings
15 Inc., asked if he might say a few words.

16 THE COURT: Certainly.

17 MR. FAIL: Thank you.

18 MR. CANTOR: Thank you, Your Honor, and appreciate
19 the words for Harvey, and Garrett thank you for saying that.
20 We were going to do a stay of the estate stay today but
21 we're going put that off 'til next month.

22 THE COURT: Okay.

23 MR. CANTOR: But, you know, Harvey was a good
24 friend, good mentor, spent a lot of hours --

25 THE COURT: And you folks have made me cry. And I

1 purposefully left out the part of that email that you read,
2 Mr. Fail.

3 MR. CANTOR: Right.

4 THE COURT: So you did not have my permission to
5 read that, but be that as it may.

6 MR. FAIL: Strike it from the record.

7 MR. CANTOR: But yes, you know, he was an
8 incredible person, and what wasn't known to most was how
9 important it was for him that every member to laugh.

10 Thank you, Judge.

11 THE COURT: I think that it's hard to explain to
12 those who don't live and work around here what this is
13 about. And we all know it and we all feel it and we're
14 extremely lucky to work in that kind of environment, because
15 I think it's extremely, extremely rare.

16 MR. ARTHUR: Good morning, Your Honor.

17 THE COURT: Good morning.

18 MR. ARTHUR: For the record, Candace Arthur, Weil,
19 Gotshal & Manges.

20 Before turning to the agenda I would like to thank
21 the Court for the moving words. I echo the sentiments of my
22 colleague, Garrett Fail, and those of Mr. Cantor.

23 I always viewed Harvey as larger than life, and
24 it's been a difficult adjustment to living in a world that
25 doesn't have Harvey Miller.

1 During his last month he shared with me that life
2 was full of twists and turns, and although he hit a bad one
3 and was trying to cope he had very found memories that
4 helped make it better, and I think there is some solace for
5 many of us that we hope to create that. I can't think in
6 the absence of a funeral service of a better place to honor
7 his legacy than this court. So, I do thank you for that.

8 Turning to the matter that's before the Court
9 today, we filed the agenda letter yesterday.

10 THE COURT: Yes.

11 MR. ARTHUR: And I am appearing on behalf of
12 Lehman Brothers Holdings Inc. in its capacity as the plan
13 administrator.

14 As Your Honor will have noted we (indiscernible)
15 move forward with one uncontested matter.

16 On April 3rd the plan administrator filed a motion
17 pursuant to Bankruptcy Rule 9019 and Section 105(a) of the
18 Bankruptcy Code seeking approval of a settlement agreement
19 relating to the restructured asset certificates with
20 enhanced returns, we refer to it as racers series 2006-20AT
21 trust transactions.

22 We provided the Court with a copy of the
23 confidential settlement agreement on April 22nd and filed
24 the declaration of Laurence Branman (ph) on April 29th.

25 U.S. Bank in its capacity as trustee under the

1 trust agreement filed a declaration yesterday in connection
2 with the settlement agreement, and counsel for U.S. Bank is
3 present in court today.

4 THE COURT: Okay.

5 MR. ARTHUR: As Your Honor will have also noted
6 the settlement agreement is a resolution of another one of
7 the FTB flip clause disputes.

8 The parties were engaged in the ADR process, and
9 at the outset sought to address the distribution of
10 approximately \$40.5 million in collateral proceeds that the
11 trustee held.

12 The plan administrator was able to successfully
13 resolve the matter with many of the certificate holders, and
14 the settlement agreement before the Court today fully
15 resolves the matter and that it addresses the remaining
16 \$5.25 million that the trustee holds.

17 As the Court will also note as with our prior
18 settlement agreements the resolution will end with the plan
19 administrator dismissing the trust issuer and the trustee in
20 connection with this transaction from the adversary
21 proceeding.

22 There were no objections to the motion and the
23 plan administrator submits that the settlement agreement is
24 in the best interest of LBSF and its estate and creditors.

25 Accordingly, you know, subject to any questions

1 that the Court may have, the plan administrator respectfully
2 requests entry of an order approving the settlement
3 agreement.

4 THE COURT: All right. Does anyone else wish to
5 be heard with respect to the trustee's motion for approval
6 of the settlement agreement relating to the so-called racers
7 filed at ECF number 49172? Sir.

8 MR. RASMUSSEN: Good morning, Your Honor.

9 THE COURT: Good morning.

10 MR. RASMUSSEN: My name is Mark Rasmussen, with
11 Chapman and Cutler on behalf of U.S. Bank National
12 Association.

13 THE COURT: Yes.

14 MR. RASMUSSEN: We of course support the motion, I
15 just wanted to make a statement for the record that it's the
16 position of the trustee that it's in the best interests of
17 the trust and the remaining certificate holder and we would
18 respectfully request that you approve the motion.

19 THE COURT: All right. Very good.

20 The papers are in order, the settlement clearly
21 passes the best interest test that is in the best interest
22 of the estate and will be approved.

23 MR. ARTHUR: Thank you, Your Honor.

24 THE COURT: Thank you.

25 MR. ARTHUR: That concludes the matters for Lehman

1 Brothers Holdings Inc.

2 THE COURT: Okay. If the folks from LBHI, if you
3 could hang around till the end of the hearing for a few
4 minutes.

5 (Pause)

6 THE COURT: Good morning. How are you?

7 MR. MITCHELL: Good morning, Your Honor.

8 THE COURT: So most of the agenda seems to have
9 evaporated, right?

10 MR. MITCHELL: Yes, Your Honor. Yes.

11 THE COURT: Except for one matter.

12 MR. MITCHELL: Except for one matter.

13 THE COURT: Okay.

14 MR. MITCHELL: For the record, Your Honor, Stuart
15 Mitchell from Hughes Hubbard & Reed on behalf of the LBI
16 trustee.

17 Yes, Your Honor, you're correct, this is -- we're
18 here today on the trustee's one hundred and sixty-third
19 omnibus objection.

20 THE COURT: Right.

21 MR. MITCHELL: This matter was initially set with
22 respect to this claim for the April 21st hearing.

23 THE COURT: Right.

24 MR. MITCHELL: This is the last remaining claim
25 subject to this omnibus objection, there were originally 89,

1 88 have already been --

2 THE COURT: Right.

3 MR. MITCHELL: -- disallowed and expunged. This
4 is claim 7002334 filed by Ms. Gon Ho (ph) Kwang.

5 THE COURT: Right.

6 MR. MITCHELL: For the record if it's helpful her
7 last name is spelled K-W-A-N-G.

8 THE COURT: Right. It's at ECF number 11778,
9 correct? The claim is filed, I believe.

10 MR. MITCHELL: Yes. And the --

11 THE COURT: I'm sorry, the response.

12 MR. MITCHELL: The response, yes, that's correct.

13 THE COURT: Yes.

14 MR. MITCHELL: As noted in the trustee's papers
15 the security at issue here is a publicly issued security
16 known as mini bonds --

17 THE COURT: Right.

18 MR. MITCHELL: -- issued in Singapore by Mini Bond
19 Limited. The documentation makes clear -- the documentation
20 reviewed by the trustee reviewed by the trustee perhaps will
21 make clear these are securities that were not issued or
22 guaranteed by LBI.

23 A member of the trustee's (indiscernible) team is
24 here should the Court have any questions with respect to
25 those documents that support the trustee's determination.

1 Ms. Kwang did file a response. She didn't file
2 it, I take that back, she submitted it via email directly to
3 the trustee's counsel.

4 THE COURT: Right.

5 MR. MITCHELL: It is annexed to the trustee's
6 reply.

7 In her -- she did not challenge the trustee's
8 objection per se, she did make a reference to fraud;
9 however, it is entire by unclear from her papers if she's
10 asserting a claim of fraud.

11 The trustee's counsel reached out to Ms. Kwang on
12 a number of occasions seeking first clarification with
13 respect to her claim, if she was asserting a claim of fraud,
14 and second, if she is in accordance with FRCP-9, Federal
15 Rules of Civil Procedure 9, which governs claims asserted
16 based on fraud, indicating that there needs to be more
17 information. There's a higher pleading standard
18 specifically. The specific statements, who made the
19 statements, where and when the statements were made, and why
20 the statements were fraudulent.

21 To date Ms. Kwang has not offered clarification
22 for her claim nor has she --

23 THE COURT: Was it made known to Ms. Kwang that
24 she could appear telephonically?

25 MR. MITCHELL: It was made known to Ms. Kwang she

1 could, and we have again as a note, reached out to her on
2 several occasions.

3 THE COURT: Right.

4 MR. MITCHELL: We did adjourn because she did
5 indicate that the April 21st hearing would not work for her.
6 We have not heard back from her since that date. We've
7 reached out on several occasions though as noted.

8 As Ms. Kwang has not established a basis for
9 recovery and has not amended her claim or response and has
10 had ample time to do so for the reasons set forth in
11 trustee's papers we respectfully request the disallowance
12 and expungement of this claim, claim 7002334 in its entirety
13 and overruling the response.

14 THE COURT: Well beyond the bare statement that
15 finding against her would go against justice and allow
16 frauds to be perpetuated, and given the very clear nature of
17 the documentation surrounding the issuance of these mini
18 bonds and the fact that these claims had been disallowed
19 across the board with respect to all similarly situated
20 claimants, and further in light of Ms. Kwang's failure to
21 submit anything in more of a detailed nature and failure to
22 appear today telephonically the trustee's objection is
23 sustained and the claim will be expunged.

24 MR. MITCHELL: Thank you, Your Honor.

25 THE COURT: All right?

1 MR. MITCHELL: We have orders and we'll send them
2 to your chambers today.

3 That concludes --

4 THE COURT: All right. I think that's all we have
5 for today.

6 MR. MITCHELL: Yes, Your Honor. Nothing else on
7 LBI --

8 THE COURT: All right.

9 MR. MITCHELL: -- portion of the agenda.

10 THE COURT: Thank you very much.

11 (Recessed at 10:18 a.m.; reconvened at 2:05 p.m.)

12 THE COURT: How is everyone today? Good. All
13 right. Who would like to start?

14 MR. SALTER: I believe that's me, Your Honor.

15 THE COURT: Okay. As you're coming up I just want
16 to put on your radar screen my concern that this not be the
17 second or third, I'm beginning to lose count, of a series of
18 piecemeal seriatim motions that are broad with respect to
19 the core issues that are presented here, because we've been
20 here together before. This is more or less the same thing.
21 In fact some of it is exactly the same thing repeated again.

22 This one has the label of Rule 60(b), which is, to
23 be blunt, a pretext, and I have no intention of (a),
24 violating anyone's due process rights, because you're
25 certainly not bound unless you're here, nor do I have an

1 intention to do this three, four, five, or ten more times.

2 I'm just not going to. There is the doctrine of law of the
3 case that's separate and apart from any due process issues.

4 So that's something we need to talk about, because
5 it's a waste of resources on many, many levels.

6 MS. HENDERSON: Your Honor, Tracy Henderson.

7 THE COURT: Yes.

8 MS. HENDERSON: I think I can alleviate most of
9 the Court's concerns.

10 Mr. Salter is going to be arguing on behalf of all
11 the clients that have presented this motion. He's going to
12 be arguing as Your Honor wishes to the core issues.

13 Would you like me to state each one for the record
14 or --

15 THE COURT: Well that's good as far as it goes,
16 which is to say that I don't know what's to preclude the
17 next group from coming in and making the same arguments or
18 different arguments to the same goal, which is to avoid in
19 the first instance participation in the ADR, and then beyond
20 that, you know, get into the merits.

21 So is it your current -- can you represent that
22 there are not -- you do not have additional clients waiting
23 in the wings for whom you are going to be making similar
24 motions?

25 MS. HENDERSON: At this time, Your Honor, we do

1 not, but I can't represent -- I think everybody is waiting
2 to see what Your Honor's decision is before anything
3 happens. But I can say that there are no other clients
4 joining, we have joined everyone.

5 THE COURT: Okay. Waiting to see in the sense of
6 the new argument with respect to the -- I'll call it the LBB
7 no recourse argument.

8 MR. SALTER: Timothy Salter, Blank Rome for
9 Stearns Lending and Group 2000.

10 We don't have any other clients in the pipeline
11 for this. We had one and then what happened was they read
12 the first motion and then they hired us to bring the same
13 motion. There was no intention to bring a --

14 THE COURT: Okay.

15 MR. SALTER: -- piecemeal, we had two clients, we
16 would have brought them at the same time, we just didn't
17 have the second --

18 THE COURT: Okay. All right. So why don't we
19 wade into it and we can circle back for that discussion at
20 the very end.

21 MR. SALTER: Okay. Timothy Salter, Blank Rome for
22 Group 2000 Real Estate and Stearns Lending.

23 Initially, Your Honor, as far as the Rule 60(b)(6)
24 motion goes Stearns Lending I believe we referred this
25 matter about four or five days prior to the initial motion

1 to bring everyone into ADR -- the ADR motion. They had the
2 order, Stearns Lending put in an objection, Group 2000
3 didn't respond, they didn't even know about it until they
4 got served with the demand letter and the indemnification
5 notice.

6 At that time we had no documents, we had no facts,
7 we had a theory of a case which said we have these
8 indemnification claims, we're not going to tell you how we
9 got them, we're not going to show our math, we're not going
10 to show you documents but we have them, we all agree that we
11 have them, and because we settled with Fannie Mae and
12 Freddie Mac that now gives rise to the damages and we can go
13 after everybody for these indemnification claims. So very
14 well, we agree to go into the ADR order.

15 So what happens is they now serve us the demand
16 letter saying we're the holder of rights from Lehman Bank.
17 Okay, that's interesting. Now you get the demand letter
18 basically saying the same thing.

19 Now Stearns Lending in their indemnification
20 notice said an assignee of rights. Group 2000, which was
21 served after Stearns Lending made their motion, it's a
22 different form where they're saying, no, we have these loan
23 purchase agreements, we're the holder of the lien purchase
24 agreements, we're the holder of rights that we got at the
25 time of the loan, we're the holder of loan purchase

1 agreements which we got in 2012, 2013, 2014, and under these
2 rights and under this agreement we are in the shoes of
3 Lehman Bank and we can go after you guys for
4 indemnification.

5 So none of that was in front of any of the lenders
6 at the time of the ADR.

7 THE COURT: What difference does that make?

8 MR. SALTER: The difference is it goes to the
9 essence of the claim. If --

10 THE COURT: Right, but here's -- I mean 60(b) --
11 you are -- what you have said, you've used the pretext of
12 the 60(b) motion to argue at bottom that you have no
13 liability. If that had legs there would never be
14 meaningfully ADR. Everybody who participates in ADR wants
15 to say in one way or the other I don't owe Lehman anything.

16 So to say, gee, you're right, you can get out of
17 ADR, every single claimant -- every single counterparty
18 would simply say, well, we'll do the ADR, but you know, we
19 don't think we have a liability. Well that doesn't make any
20 sense.

21 So what you're saying is no different from -- the
22 statute of limitations is an affirmative defense just like
23 in the case of a suit for the purchase and sale of widgets,
24 it's just like saying I already paid for the widgets or you
25 never shipped me the widgets. It's just an affirmative

1 defense. So too is an argument that there wasn't a proper
2 assignment. It's no different.

3 MR. SALTER: We're --

4 THE COURT: So the -- this pretext of saying I'm
5 entitled to this extraordinary 60(b) relief because I don't
6 think I am liable I'm just having -- I'm having a very hard
7 time, you know, getting over that, and it really frankly
8 doesn't much matter, you seem to be focusing me very
9 particularly on what was or was not said in the demand
10 letters.

11 MR. SALTER: Because there is a distinction
12 between an affirmative defense of statute of limitations and
13 failure to state a cause of action. If you're -- it's
14 basically a standing issue.

15 So to go into factual mediation with a party which
16 does not have -- if we went to court and some courts are
17 saying, yes, you do not have a cause of action, some courts
18 are saying, you do have a cause of action, well we'll let
19 this go to trial.

20 THE COURT: But --

21 MR. SALTER: What we're saying is --

22 THE COURT: -- so you're seeking to characterize
23 the fact that LBHI does -- you're seeking -- what you're
24 attempting to convince me is that LBHI doesn't have
25 standing, right? So it's the wrong -- it's as if it's a

1 stranger to this proceeding.

2 MR. SALTER: It's a -- it's not the -- it is --
3 like the issue of the fact that they did receive an
4 assignment for our purposes we're not arguing that.

5 THE COURT: Okay.

6 MR. SALTER: As a matter of law they have received
7 an assignment.

8 THE COURT: Right. So the issue is --

9 MR. SALTER: As a matter of fact --

10 THE COURT: -- what -- the issue is the -- what's
11 the -- what was the assignment?

12 MR. SALTER: As a matter of fact what was assigned
13 to them? Are there enforceable claims that were assigned to
14 them?

15 THE COURT: Exactly. And that's a lawsuit that I
16 sent to ADR.

17 MR. SALTER: I would --

18 THE COURT: It's a lawsuit and I've sent it to
19 ADR, and you folks just don't want to go.

20 MR. SALTER: I would think with given the -- I
21 guess if you want to say difference in the opinions between
22 the Cornerstone case and the Security National case. Now, I
23 disagree with Cornerstone for a lot of reasons, I don't
24 think it's applicable, but if we argue that's a split of
25 authority I would say that that issue, as evidenced by that

1 split authority, is not proper for mediation where we're
2 going to go in front of a Simpson Thatcher partner and he's
3 going to say, you know what, I totally agree Group 2000, you
4 do not -- these people do not have a right to
5 (indiscernible) against you. Then we're going to take the
6 Stearns Lending, we're going to go to a Jones Day partner
7 and he's going to say, you know what, I totally agree with
8 Cornerstone, and you know, they can seek indemnification
9 from you, and the question is how much do you owe them? And
10 I think that's an important difference of who's going decide
11 if this is -- if there was an assignment of rights, if
12 they're in the shoes of Lehman Bank what that means, and
13 these clients are saying we want a judge to say that and not
14 a partner in a law office, and oh, by the way we have to --

15 THE COURT: So you say that you win because of
16 Security National?

17 MR. SALTER: No, Security National was -- because
18 we didn't -- obviously haven't had discovery, so Security
19 National did have a full trial and they stood, which was not
20 disputed by Lehman Holdings, that these loans are without
21 recourse. So without recourse Lehman Bank we all agree with
22 that, they have no recourse against Lehman Bank.

23 THE COURT: Right.

24 MR. SALTER: Security National then says with
25 those facts if we applied New York law of assignment, which

1 is also not disputed, that means that Lehman Holdings as an
2 assignee cannot have better rights than the assignor Lehman
3 Bank.

4 THE COURT: Okay. But let me explain to you, and
5 I'm going to put to one side the 60(b) motion, because
6 frankly I could have denied this motion without even having
7 you come in today because you haven't made a showing on
8 60(b). But since you're here and since we have to advance
9 the ball, and since part of this exercise apparently is
10 designed to inform other parties about what they might
11 expect let's talk about the LBB issue, all right?

12 What you're telling me is that because LBB sold
13 the loans to LBHI without recourse, right, LBHI is done,
14 they're out of luck, right?

15 MR. SALTER: If it's a chain, once the chain is
16 broken everyone on the other side of that link is free to
17 go.

18 THE COURT: Okay, beautiful.

19 So when we were here last time and we were
20 discussing the statute of limitations we got into this
21 interesting world in which there was never a moment in time
22 at which LBHI could actually have asserted its claims.
23 Okay? I can't recall if you were here for that and you'll
24 have to forgive me.

25 But what you're telling me this time is --

1 collectively, is that LBB, for reasons that had nothing to
2 do with anyone else except for the way it ran itself, LBB on
3 a non-recourse basis sells the paper to LBHI, right? And
4 LBB says to LBHI, here you go, don't ever look at me for
5 anything ever again, I am done. Okay?

6 So what you are saying is this is fantastic,
7 because from that moment on even if we, the originators, had
8 created and sold unbelievably defective paper, the fact that
9 LBB decided to sell that paper on a non-recourse basis to
10 LBHI (indiscernible) gets us off the hook. That's what
11 you're saying, right?

12 MR. SALTER: The law of assignment demands that.
13 I mean the intention of the parties between Lehman --

14 THE COURT: Now let me give you a hypothetical.

15 MR. SALTER: -- Bank and Lehman --

16 THE COURT: Okay? I'm giving you a very hard
17 time, but --

18 MR. SALTER: That's fine.

19 THE COURT: -- hopefully you're enjoying it.
20 Okay? I -- she told you I was going to, right? She said I
21 was going to give you a hard time.

22 MR. SALTER: I have a whole book of answers for
23 you, Judge.

24 THE COURT: Okay. Let me give you a hypothetical
25 to try to make my point, okay?

1 I buy a fantastic new car, it comes with a
2 wonderful warranty, okay? But I decide I don't like the
3 color. I sell it to you, no recourse, don't come
4 complaining to me when the transmission fails. But I sell
5 it to you with the full manufacturer's warranty. At the
6 moment I sell it to you I don't have a claim, the car is
7 running great, or I just haven't noticed that the little
8 transmission light is going on.

9 Does the fact that I sold it to you with the
10 warranty paper and all that stuff but no recourse to me,
11 don't come complaining to me, go talk to the dealer, pick
12 your dealer, that doesn't mean that I haven't assigned to
13 you my rights, it simply means that I had no claim, I didn't
14 assign you the claim. I'm selling you the car pursuant to
15 all of this paper that includes warranties issued by the
16 manufacturer and that's what you're getting. And the next
17 day when the transmission fails you can't call me and say,
18 pay me, I say no recourse.

19 LBHI the next day if it had discovered that the
20 paper was defective there's no recourse, but it assigned its
21 rights as part of that transaction, and that's what --
22 exactly what, I know you've said that the case was a day
23 late and a dollar short, but that's exactly what was
24 clarified in the recent case that was submitted in Security
25 National.

1 MR. SALTER: A breach of warranty, to the extent
2 that you assign a warranty, because we're not arguing that
3 they wouldn't be the proper party to -- basically the
4 warranty -- breach of warranties, breach of claims, that's a
5 statute of limitations issue.

6 The indemnification issue, because there's an
7 indemnification provision, indemnification provisions are
8 strictly construed and they agreed to indemnify particularly
9 Lehman Bank that's the right which is individual to Lehman
10 Bank and that's what couldn't be assigned. I'm sorry, it
11 could be assigned but the measure of damages is those
12 suffered by Lehman Bank. You can assign --

13 THE COURT: So this does appear to be your theory,
14 but when you combine this theory with the statute of
15 limitations theory I get to the point, which I got to before
16 when we were dealing with statute of limitations, that with
17 respect to statute of limitations the rights claim was
18 femoral. If it existed it might have existed for a few
19 indiscernible moments in time.

20 What you're telling me now is that the
21 indemnification right was illusory, was completely illusory,
22 that there was basically no situation in which the reps and
23 warranties, which were given by the originators, could ever
24 be asserted, that -- and you're going to tell me bad
25 business decision, bad business decision, that was a

1 business decision that LBB and LBHI made. They made that
2 decision for reasons that had nothing to do with anything
3 but the way they kept their books internally.

4 MR. SALTER: They -- will have unintended
5 consequences? I mean the originators made the promise maybe
6 they knew how it was sold, maybe they didn't, now if it's
7 not a related entity is the examination different? If they
8 were selling instead of Lehman Bank to Lehman Brothers
9 Holdings, if Lehman Bank was signed without recourse to Bear
10 Stearns.

11 THE COURT: They assigned to LBHI all of their
12 rights. Their rights included the right to insert an
13 indemnification claim against the originators of the loan.

14 So under your theory of the world had they done
15 that within the six years of the origination and there were
16 no statute of limitations would you seriously be maintaining
17 that because LBB sold the loan to LBHI on a no recourse
18 basis that that sale did not include indemnification rights?

19 MR. SALTER: Yes, because it's --

20 THE COURT: You would.

21 MR. SALTER: -- still the same law -- basic law of
22 assignment that these --

23 THE COURT: So then how about the notion that the
24 originators engaged in a massive fraud, because the words in
25 the seller's guide surely led everybody to believe that

1 third-party assignments were contemplated. The entire
2 structure of this industry was premised on the subsequent
3 assignment pooling and selling of those mortgages. That's
4 the way these folks made money.

5 So for you to be telling me that in fact if you
6 didn't do the paper in exactly the right way all of those
7 rights would be cut off is pretty astonishing.

8 MR. SALTER: I have -- the difference is the
9 rights -- because we don't contest there are certain
10 indemnification rights which follow as the holder of the
11 notes. So we sold the loan, we're going to warranty that
12 loan, it's going to go up the line.

13 The same is not true for the loan purchase
14 agreement in which they try and claim their rights out to.
15 The loan purchase agreement is a contract between two
16 parties and exists separately and apart that any rights to
17 go after them which followed the loan.

18 So if Lehman Brothers Holdings --

19 THE COURT: But the case that you're relying on
20 distinguishes the indemnification agreement from the other
21 pieces of paper that constitute the loan purchase agreement,
22 and that's why in the case on which you rely it went the way
23 that it did because there was no claim to assign under the
24 indemnification agreement, but the rights were assignable
25 and they were assigned.

1 MR. SALTER: But the rights that were assignable
2 were Lehman Bank's own rights, and Lehman Bank's own rights
3 at the time of the assignment did not -- they possessed a
4 right under the contract, they did not possess a right as a
5 matter of fact. Once they sold those loans without recourse
6 nothing could ever happen that would give them a right to
7 sue our clients for damages under those loans.

8 So what happens is --

9 THE COURT: But this gets back to the other -- the
10 fallacies that we went through when we did the statute of
11 limitations defense, is that at the moment after LBB sells
12 the loans and assigns its rights it doesn't -- it's not the
13 holder, it doesn't have a right to assert. So of course it
14 doesn't have any.

15 MR. SALTER: It's still a holder -- it's still --
16 even though it sold the loans it still had the loan purchase
17 agreement. The loan and the loan purchase agreement travel
18 two different paths. The loan purchase agreement was
19 assigned in the case of Stearns Lending a week before the
20 ADR order was heard.

21 So the rights to indemnification that followed the
22 loan up the line is different than the contractual right to
23 indemnification that was contained in the loan purchase
24 agreement.

25 The loan purchase agreement is between two parties

1 and it's particular to Lehman Bank.

2 THE COURT: What's your basis for saying that?

3 MR. SALTER: Because that's what the loan purchase
4 agreement says. The loan purchase agreement -- LBHI was not
5 a party to the loan purchase agreement and the basic law of
6 assignment says any right that you would have is the right
7 that your assignee gets.

8 So this loan purchase agreement when they took it
9 out in 2014 or 2013 in the vault of Lehman Bank was
10 worthless, they could not sue hey, these loans all went bad,
11 hey we have these agreements, let's go after the originators
12 for it. Well we can't, we didn't suffer any damage, we had
13 no claims. Okay, let's bring it across the hall to Lehman
14 Brothers Holdings. Now they're worth \$20 million. That
15 bringing a worthless document across the hall and giving it
16 \$20 billion worth of value violates the basis law of
17 assignment, that this person now has a claim for \$20 billion
18 where this person did not, and that's what we're trying to
19 say, and that's different than the right step followed the
20 note.

21 Those -- so if you're saying you originated a bad
22 note and now you walked away well that's not true because
23 there are breaches of claims and warranties that followed
24 the subsequent holders of the note up the line.

25 They're not subsequent holders of the note, they

1 were at one time, they're not now. They sold it, they made
2 their own promises, they actually had their own promises to
3 Fannie Mae and Freddie Mac where X number of loans were
4 going to be reunderwritten. There's another case which I
5 didn't cite, but there was another case where there was a
6 finding of fact that they weren't reunderwriting them.

7 So if our originators made bad loans Lehman
8 Brothers Holdings we sold bad loans, and they promised
9 Fannie Mae that they were looking at those loans and
10 reunderwriting them. And there was a case --

11 THE COURT: The bottom line as far as you folks
12 are concerned though is that you are not answerable to
13 anybody for having originated bad loans.

14 MR. SALTER: I would --

15 THE COURT: That's the bottom line.

16 MR. SALTER: -- disagree with that premise. It's
17 under this theory why they dragged us into ADR, they're --
18 we don't answer under this theory. And I'm not going to sit
19 here and think of all the different ways they could.
20 Certainly in their opposition they came up with five or six
21 different ways they could do it.

22 Now had I brought my -- instead of filing a Rule
23 60(b) motion, had I brought that and that was my paper I
24 submit to the mediator, hey guess what, we're not going to
25 talk about the hearsay issues, we're not going talk about

1 all the loan by loan issue, we're going to rely on the fact
2 Mr. Mediator that under this claim they said we have a loan
3 purchase agreement, this loan purchase agreement gave us
4 rights.

5 THE COURT: Right.

6 MR. SALTER: Under this theory they have no claim.
7 If they had answered, oh, well guess what, we have six
8 different theories and now we show up to mediation that's --
9 there's a basic unfairness to the fact that they have six
10 different theories in which they can claim after the facts.
11 They came to us with one theory --

12 THE COURT: Well why is there an unfairness?
13 There have been thousands of parties who have engaged in ADR
14 in which they say there's 16 reasons why we're not liable
15 and the -- and Lehman comes up with 15 reasons of their own
16 why they are. That's what ADR is.

17 You are seeking to clothe your particular argument
18 with some secret sauce or special magic that sets you apart,
19 and it just doesn't. It just doesn't.

20 I cannot solve the fact that -- the statute of
21 limitations argument I've already ruled on. I'm going to
22 publish a decision on it within about a week. I told you it
23 was coming, it has been in the works, I have a lot of other
24 things to do. You entered an order, we tolled the appeals
25 period. Whether or not you can take that up and get a

1 higher court to give its views on that I really don't know,
2 I'm not going to express a view on that, but you bring me an
3 issue, I give you a decision, what happens after that I
4 can't help it.

5 So what you're telling me is this is really
6 unfair, Judge, because we know you're wrong and you're going
7 to make us all go through all of this stuff and it's not
8 fair. That's what litigation is.

9 MR. SALTER: We weren't a party to any prior
10 motions or any prior statute of limitation issues, I have no
11 knowledge of whatever was litigated between other parties
12 before we showed up.

13 The basic premise of the unfairness is if they
14 serve with an adversary complaint, if the indemnification
15 notice was an adversary complaint and we said, hey, you know
16 what, under the laws of assignment they failed to state a
17 cause of action we would put that motion and the judge would
18 decide it, and then if we did factual ADR afterwards, you
19 know, which is very cost and labor intensive, then you
20 engage it.

21 Right here they're saying, okay, let's go loan by
22 loan, facts by facts and then --

23 THE COURT: You made the statute of limitations
24 argument.

25 MR. SALTER: To the extent that the breach of

1 warranty claims were assigned by Fannie Mae and Freddie Mac.
2 We did not make the argument that the indemnification -- I
3 didn't in my motions -- that the indemnification was really
4 a remedy for breach of warranty and representation.

5 THE COURT: You did. You said, "Originating
6 lenders failure to timely repurchase a loan does not
7 constitute a separate breach of the loan purchase
8 agreement."

9 MR. SALTER: Under -- yeah, but they're inserting
10 -- they're not asserting breach of warranty claims against
11 us, they're asserting indemnification claims against us as a
12 separate and distinct cause of action.

13 So we brought that up simply to illustrate the
14 fact that they also don't have various other theories of
15 liability to the extent that they would say well we were
16 assigned breaches of warranty by Fannie Mae and Freddie Mac.
17 Because at that time actually they hadn't made any demands
18 to be purchased, all the demands to be purchased were made
19 after we already were subject to the ADR.

20 THE COURT: Okay. Thank you.

21 MR. SALTER: Thank you.

22 THE COURT: Well?

23 MS. HENDERSON: Your Honor, just for clarification
24 of the record. I -- we're submitting on the pleadings for
25 any statute of limitations, and there are separate --

1 THE COURT: Yes. No --

2 MS. HENDERSON: -- arguments. So just for Your
3 Honor's edification.

4 THE COURT: I'm sorry, then maybe I'm
5 understaffed, because I'm looking at the Blank Rome pleading
6 and at the bottom section it says that the claims are barred
7 by the statute of limitations.

8 MS. HENDERSON: Right. And just for the Court's
9 edification we intended those to be two separate arguments,
10 and I think as a collective submitting to the Court on the
11 pleadings on that particular argument and the first argument
12 relating to non-recourse --

13 THE COURT: Yeah, I understand --

14 MS. HENDERSON: Okay.

15 THE COURT: -- the non-course, but I just didn't
16 understand the statement that was just made that we're not
17 arguing statute of limitations.

18 MR. SALTER: It was an alternative argument that
19 all claims assigned by Fannie Mae and Freddie Mac would be
20 barred by the statute of limitations. But it wasn't the
21 main reason we weren't (indiscernible) indemnification
22 because they were not alleging to be enforcing rights as an
23 assignee of Fannie Mae and Freddie Mac, they were alleging
24 to be asserting rights as assignee of Lehman Bank.

25 So we just were trying to head off the possibility

1 they're saying, okay, well even if we didn't get these
2 rights from the loan purchase agreement we have this general
3 undefined assignment from Fannie Mae and Freddie Mac, and
4 oh, guess what, that includes these rights.

5 THE COURT: Okay. I think I understand, but
6 that's all -- you're -- you don't -- you're talking
7 Section 710, and last time we were talking about the
8 difference between 710 and 711.

9 MR. MAHER: Yes, Your Honor.

10 THE COURT: Right?

11 MR. MAHER: Yes, Your Honor.

12 THE COURT: I just -- I have to make sure that I'm
13 in the same reality as everybody else. Whether you agree
14 with me or not, right?

15 MR. MAHER: Yes, Your Honor.

16 THE COURT: Okay.

17 MR. MAHER: Your Honor, Bill --

18 THE COURT: Can you help me out on the last point?

19 MR. MAHER: Absolutely. Bill Maher on behalf of
20 Lehman Brothers Holdings Inc., Your Honor.

21 It is evident from what you have said that you
22 have it exactly right. You have it exactly right on every
23 issue on which you've spoken today. They have it completely
24 wrong.

25 They are telling you that they're not raising a

1 statute of limitations issue. If you read their papers they
2 are raising a statute of limitations issue. In fact they go
3 on for several pages on statute of limitations. The --

4 THE COURT: But I think I understand the
5 distinction that they're making under 710. In other words
6 in the last round it was, all right, we get it that you're
7 asserting claims as a result of having paid Fannie and
8 Freddie, right? But you paid Fannie and Freddie or that we
9 got the plan against Fannie and Freddie in 2014 outside the
10 six years, no separate contractual indemnification claim,
11 it's just a remedy like every other remedy under 710, to
12 which I said, wrong --

13 MR. MAHER: Right.

14 THE COURT: -- read the Colorado case --

15 MR. MAHER: Right.

16 THE COURT: -- the two Colorado cases decided by
17 Judge Bremer --

18 MR. MAHER: Correct.

19 THE COURT: -- there's a difference between 710
20 and 711.

21 I think what I'm being told here is that we're
22 just under 710 even if LBB had assigned something it would
23 be a remedial right under 710 and that's barred.

24 So, I think that's what I was --

25 MR. MAHER: That's not what the American Law Group

1 -- Mortgage Law group's papers says. That may be what Blank
2 Rome's papers say.

3 THE COURT: That's what Blank Rome's papers say.

4 MR. MAHER: Yeah.

5 THE COURT: Right.

6 MR. MAHER: But again, Your Honor --

7 THE COURT: Okay.

8 MR. MAHER: -- it is clear to me that you get
9 these issues so well that I'm unsure what I should say to
10 help you.

11 THE COURT: Well why don't you help me with the
12 last argument about the -- I'll call it the subsequent
13 assignment argument, the oh, dear, we didn't do this right
14 the first time, now let's hand the piece of paper over and
15 make them worth something when we didn't actually assign it
16 from the get go.

17 MR. MAHER: Well let's -- it would be helpful
18 actually if we go through what actually happened here.

19 THE COURT: Sure.

20 MR. MAHER: Because they have misstated. I think
21 counsel inadvertently misstated what happened.

22 I have a collection of all of the assignment
23 agreements here that we can walk through to see what was
24 assigned, when to whom.

25 THE COURT: We're doing this -- again, just to be

1 clear, this is a 60(b) motion.

2 MR. MAHER: Right.

3 THE COURT: Right? This is not a summary judgment
4 motion, it's not a motion to dismiss, it's just a 60(b).

5 MR. MAHER: Right. And, Your Honor, I'm only do
6 this frankly for purposes of being helpful to the Court,
7 because it's absolutely clear from what you said and what
8 the law is that they have no hope of winning a 60(b) motion.

9 We were here last summer when Your Honor presided
10 over a hearing on the ADR process in which everyone who's
11 here got notice of that ADR process, got notice of the
12 hearing, and in fact Stearns Lending, one of the parties
13 showed up and objected. They didn't object on statute of
14 limitations grounds, they didn't object on lack of
15 assignment grounds, and now six to nine months later they're
16 back here after Your Honor has already entered an order and
17 saying, 60(b), I want to vacate the ADR order and make it a
18 nullity even though I knew the things back then that I could
19 have raised back then, that I chose not to raise back then,
20 and I choose to raise them now nine months later.

21 60(b) is very, very clear. Numbers 1 through 5
22 have to be raised early on, certainly within a year. Number
23 6 the catch all. It says, "Any other reason that justifies
24 relief." Every one of the cases addresses 60(b) says it has
25 to be extraordinary, it has to be out of the ordinary, it

1 has -- it can't fit within one of the other categories of
2 60(b).

3 So the only thing that they could possibly qualify
4 under, Your Honor, is 60(b)(1). 60(b)(1) is for mistake,
5 inadvertent surprise, or excusable neglect. They don't meet
6 those standards under the case law so they don't try to say
7 that they're moving under 60(b)(1). If you look at their
8 motions they're moving under 60(b)(6).

9 60(b)(6) is supposed to be we don't know -- that
10 you don't fit under any other categories, but it's so
11 outrageous and extraordinary that the Court will hear it.

12 It is not for a run of the mill I didn't raise
13 something last summer and I want to raise it now.

14 So if we're talking about 60(b) it's not even
15 close.

16 THE COURT: The thing that baffles me, this is
17 kind of a general comment, is that now for the second time I
18 get papers and people point out all these courts all over
19 the country who are dealing with Lehman paper.

20 MR. MAHER: Yes.

21 THE COURT: And what that says to me -- I mean
22 some of them -- some courts agree with each other and some
23 courts disagree --

24 MR. MAHER: Right.

25 THE COURT: -- because we're only people and we

1 have people who litigate before us. Sometimes the paper is
2 different, things are not identical. If they were you could
3 give it to a robot, right?

4 MR. MAHER: Yes.

5 THE COURT: But we don't have that. So that
6 suggests to me at least that reasonable minds can differ,
7 they make different outcomes based on different paper, and
8 it also suggests to me that this is not the type of
9 situation where this is just, you know, wow, missed it by a
10 country mile, this was a thousand percent wrong, would be a
11 manifest injustice --

12 MR. MAHER: Correct.

13 THE COURT: -- to have this go forward.

14 MR. MAHER: Exactly.

15 THE COURT: That's the way I view a 60(b).

16 MR. MAHER: Correct.

17 THE COURT: That's on the one hand.

18 On the other hand might a higher court disagree
19 with my decision on the statute of limitations? Sure.

20 Absolutely. I think I'm right, obviously I wouldn't have
21 ruled the way that I did if I didn't think I'm right. But
22 could it happen? It absolutely could. Does it worry me
23 that folks could go through a lot of litigation and then
24 there's a reversal? Sure. I've only been reversed once in
25 five years.

1 MR. MAHER: That's because you're very thorough
2 and very careful, Judge.

3 THE COURT: Well, but the point is that -- and I'm
4 saying this more for these folks' benefit -- it's not likely
5 that I stick to my guns, insist that parties continue to
6 litigate, because if I'm incorrect and reversed -- which are
7 not necessarily the same thing -- then you've undergone a
8 tremendous expense when had it gone other way from the get
9 go you wouldn't have had to have.

10 So this is not simply a case, and then I'll let
11 you go through that exercise, because I think it'd be very
12 useful for everybody. So, I'm a little meandering me, but
13 indulge me.

14 I think folks sometimes think Lehman always wins
15 in this room. That is categorically not true. Just ask the
16 lawyers for Lehman. Lehman doesn't always win. But I'm
17 very aware of the burden of insisting that parties continue
18 to engage in the process, because it's not without expense.

19 MR. MAHER: But if we think about what's at stake
20 here, Your Honor, putting aside the 6(b) standard --

21 THE COURT: Right.

22 MR. MAHER: -- what these parties have done, and I
23 want to point this out to give you a sense of what Lehman is
24 up against with these counterparties.

25 They have -- because they seek extraordinary

1 relief when they're not entitled to it to avoid showing up
2 in New York for an ADR to try to resolve the issues in a
3 mediation in a room with the mediator.

4 So for that they've filed voluminous papers that
5 you've had to read, we've all had to read and respond to,
6 which was more costly, Your Honor, much more costly than
7 participating in the mediation process, showing up in New
8 York as they've shown up in New York here with their client
9 and trying to resolve is issue. That is what we face.

10 These people had originated crummy loans with
11 broad representations that the loans were good, with broad
12 categories that said you could assign those loans to
13 successors, assigns, anybody you want, and we would stand
14 behind them. And they are kicking, scratching, clawing,
15 doing anything at any cost to avoid standing behind their
16 representations and warranties.

17 Now he told you just a minute ago with respect to
18 the warranty issue that well, we have the LPA and the rights
19 under the LPA and then we have the note, and we stand behind
20 the note. They don't, Your Honor, it's illusory just like
21 you said before with their statute of limitations argument.

22 Here's their argument on the note. And remember,
23 in Section 711 it says we're indemnified -- "Purchaser,
24 purchaser's designees, including any subsequent holder of
25 the note." Then it says later on, "Any subsequent holder of

1 the note shall be a third-party beneficiary to this
2 agreement entitled to the rights."

3 So under 711 we have third-party beneficiary
4 rights as a subsequent holder of the note apart from the LPA
5 rights, which is what he's saying.

6 THE COURT: But now they're saying that ah ha, you
7 don't hold the note anymore.

8 MR. MAHER: Yes. So he's saying that under 711
9 when I'm a subsequent holder of the note when I sell it to
10 you and then you put it back to me and I need those
11 indemnification rights they're gone. They're gone. You
12 never had them. In other words they're illusory completely
13 under their theory of the case.

14 That's why the agreement says, "Any subsequent
15 holder of the note." Could be more than one. You don't say
16 you have to be a subsequent holder of the note who holds the
17 note currently. Because the point was everybody knew that
18 these loans were going to travel. They're going travel from
19 the originator to Lehman Bank to LBHI to maybe somebody
20 else, and everybody along the way was entitled to rely and
21 depend upon the representations and the warranties and the
22 indemnifications that remain when somebody originally
23 sourced the note and the loan, and that's the way the
24 agreement reads.

25 So if you read the seller's guide it's elegant.

1 It talks about the breadth of the assignment rights. It
2 talks about successors and assigns more than one place. The
3 LPA itself has a reference to successors and assigns.

4 If you read 711 on the indemnification language,
5 it's just as broad of language as you can imagine for
6 indemnification.

7 So what was -- and the representations and
8 warranties relate to key issues.

9 THE COURT: So what about the failure to give
10 notice? There's --

11 MR. MAHER: The failure to give notice, Your
12 Honor, if you look under 701 there is no obligation to give
13 notice. If you look under 713.3 there is an obligation to
14 give notice if you're assigning certain other rights. Not
15 all the rights, there's a sentence after that that said if
16 you're only assigning rights under the agreement you don't
17 have to give notice. However, so our position is we were
18 not required to give notice under the terms of the
19 documents.

20 However, if you believe that we were entitled --
21 that we were required to give notice we cite in our brief,
22 Your Honor, in a footnote, that that doesn't affect the
23 validity of the assignment, it only gives them a potential
24 claim for breach that you didn't tell me that you assigned
25 and I did something in the interim that caused me harm.

1 They won't be able to show that, Your Honor, because they
2 did nothing.

3 So whether or not they gave notice it's
4 irrelevant. So --

5 THE COURT: So there's no language that says that
6 an assignment without giving notice is void ab initio.

7 MR. MAHER: Exactly. And it has to say that under
8 New York law --

9 THE COURT: Yes, I'm familiar with that law.

10 MR. MAHER: -- in order for it to be an invalid
11 assignment. Contracts are freely assignable under New York
12 law unless they say that you cannot assign them. Here to
13 the contrary the language says you can assign them. It
14 didn't have to say that you could assign the rights under
15 the seller's guide or the LPA, they would be assignable as a
16 matter of law unless they said you can't assign them.

17 So the fact that it does say that you can assign
18 these rights in a broad fashion, we cited a case, Your
19 Honor, it says, clearly the parties intended such a result.
20 It wasn't just that this New York law permits it, the
21 parties intended it because the document says it itself.

22 And so for them to now claim well because Lehman
23 Bank internally with Lehman Bank Holdings decided that they
24 were going to do it without recourse that means we walk
25 free. In other words a different way of saying the rights

1 are illusory.

2 Coincidentally happy day because you assigned your
3 rights without recourse just as in your car example, Your
4 Honor, that means that my indemnification obligations are
5 void. That's not right. It would have had to have been a
6 release to the original originator, somebody saying if
7 Lehman Bank turned the originator and said you don't owe me
8 anymore that would be somebody was released who's the
9 originator, not somebody in between, because Lehman Bank
10 Holdings came in and stepped into the shoes. We agree with
11 that of Lehman Bank -- Lehman Brothers Bank. But that
12 doesn't mean I have to sue for their losses. I become the
13 purchaser.

14 THE COURT: You don't have to sue for LBB's
15 losses.

16 MR. MAHER: Correct. I sue for LBHI's losses, and
17 that's what the cases clearly say. That's what Judge
18 Stewart said just recently a couple of -- a week ago in the
19 LBHI versus Security National case. He relied, Your Honor,
20 on the Utah -- on the Arkansas case --

21 THE COURT: Right.

22 MR. MAHER: -- which very clearly holds in the
23 exact same argument that they're making before you right
24 now, Your Honor. That case clearly holds that the without
25 recourse language it doesn't matter. That wasn't just Judge

1 Stewart the other day saying that, that's been said in a
2 number of cases. Specifically it's referenced in LBHI
3 versus National Bank of Arkansas. It says:

4 "NBA asserts that at the time LBB signed the
5 assignment agreement with LBHI on January 1, 2011 LBB had no
6 rights to assign because LBB had assigned all its loans to
7 LBHI without recourse years earlier."

8 The court rejects that and says that the
9 assignment agreement assigned to LBHI the contracted rights
10 to the loans at issue. This argument has been run before.
11 Every court that has considered that argument, Your Honor,
12 has rejected it.

13 There is not a single case that they cite to you,
14 not one, involving this loan purchase agreement -- any of
15 these loan purchase agreements or any seller's guide in
16 which a single court has said that that did not validly
17 assign the rights to LBHI. There's not a single court
18 that's done that.

19 They have one decision from Judge Nuffer in Utah,
20 which his colleague on the bench just distinguished the
21 decision last week, saying that was a separate
22 indemnification agreement, we're not talking about the loan
23 purchase agreement in the seller's guide, and he said, in
24 fact that indemnification agreement said you still have
25 rights under the loan purchase agreement seller's guide and

1 he said, so, I'm going to analyze those rights. He analyzed
2 those rights, including the argument that it was without
3 recourse, and he rejected it, and said definitively that
4 these rights were properly assigned under the assignment
5 agreement.

6 So, Your Honor, they have nothing. Even their law
7 saying indemnification agreements are to be strictly
8 construed, yes, the courts say that when it is unclear
9 whether there is supposed to be indemnification or not. Not
10 in an agreement where there's a specific indemnification
11 provision that says that purchasers and successors and
12 assigns and subsequent holders of the note are indemnified.
13 You don't strictly construe that. That is construed in
14 accordance with what the parties intended in their express
15 terms.

16 And when you couple that with the broad assignment
17 language that is included in a number of places it's clear
18 as every court has held that these agreements are and were
19 properly assigned under a written assignment agreement.

20 Now we have four other arguments, Your Honor, why
21 even without the written assignment agreement these rights
22 are assigned, and I'm happy to go through those.

23 THE COURT: I think it -- I don't think that it's
24 necessary.

25 MR. MAHER: But there's one last thing, and I

1 don't know if you want me to go through this or not, Your
2 Honor, but what he said -- what Counsel said about these
3 rights being assigned one week before we filed the ADR
4 notice is not correct. All right? They're -- and I can go
5 through all of these with you. I have a binder here in
6 which -- and Counsel has access to all of these documents.
7 They initially filed papers, Your Honor, in which they say,
8 I never got a copy of any assignment agreement, Lehman has
9 never given me a copy of the assignment agreement. What did
10 we do? We pointed them out in the document production that
11 we gave them. We said, here it is up on the web -- because
12 we don't put it up on the web for everybody, Your Honor,
13 only with respect to the parties -- these are -- this is
14 personal identification for the borrowers -- so we only put
15 it up for the party at issue. We put it up on the web and
16 we said, you can go to this web, click on this, and that
17 will give you the assignment agreement.

18 So in their replies what do they say? They're not
19 saying I never got any assignment agreement, now they all
20 admit that they have assignment agreements.

21 I have them collected here and I'm happy to go
22 through them, Your Honor, but here's -- here is and I'll
23 summarize, and I'll be happy to go through each issue
24 because I've done it, but I'll summarize for you broadly
25 where it comes out, right?

1 There's a September 2, 2008 assignment agreement.
2 There have been four cases -- four or five cases if you saw
3 it was the same assignment agreement.

4 THE COURT: Right.

5 MR. MAHER: And what they do is --

6 THE COURT: But on that one they say that there
7 wasn't enough specificity.

8 MR. MAHER: Right.

9 THE COURT: I think the argument on that one is
10 that there wasn't enough specificity.

11 MR. MAHER: One of the arguments, right? However,
12 if you read the assignment agreement -- and I'm happy to go
13 through these, Your Honor -- it says, "We hereby assign and
14 the assignee hereby accepts." that the present language
15 which is what is required in an assignment agreement. It is
16 valid on its face and every court that has looked at it has
17 so held.

18 It attaches -- it says "to the corresponding
19 sellers referred here on Exhibit A." Right. And there's a
20 voluminous Exhibit A --

21 THE COURT: Right. So they say on that, yes, yes,
22 you say sellers, but you don't say particular ones.

23 MR. MAHER: Right.

24 THE COURT: So that doesn't work.

25 MR. MAHER: That's what they say, but that's not

1 what the law is. The law as they cited, it's in the case
2 they cited, Your Honor. It's in the Moskowitz (ph) case,
3 the Bankruptcy Court in Moskowitz, it's on page -- and I
4 have it here, Your Honor, if you'll give me a moment.

5 THE COURT: I mean there's a little bit of irony
6 here of course.

7 MR. MAHER: Here's the reality, Your Honor.

8 THE COURT: That I'm sure you're aware of. No?

9 So in many, many of the Chapter 13 cases over
10 which I've presided the banks wanted to make the argument
11 that the assignments were good enough when they sought to
12 enforce their foreclosure rights against their borrowers.

13 MR. MAHER: Right.

14 THE COURT: The neighborhood rule --

15 MR. MAHER: Right.

16 THE COURT: -- in baseball.

17 MR. MAHER: Right.

18 THE COURT: They --

19 MR. MAHER: Second base.

20 THE COURT: Yes. Sought to apply the neighborhood
21 rule with respect to assignment.

22 MR. MAHER: Right.

23 THE COURT: So now the opposite argument is being
24 made that, you know, these assignments were not particular
25 enough, there weren't enough i's dotted and there weren't

1 enough t's crossed. So there's a little bit of irony. I
2 guess if you do enough cases you find these connections.
3 But be that as it may.

4 MR. MAHER: Your Honor, we cite --

5 THE COURT: So you're saying that that doesn't
6 hold water either.

7 MR. MAHER: Not at all. We -- in fact there is
8 specificities. If you look at the Moskowitz case which we
9 cite on page 9, footnote -- page 9 in a footnote it says:

10 "There's no particular phraseology required to
11 affect an assignment. All that is required is that property
12 must be sufficiently identifiable and there must be an
13 intent to assign a present right in the subject matter of
14 the assignment divesting the assigner of all control over
15 that which is assigned."

16 And in that case, Your Honor, what the designation
17 was, was all insurance proceeds to which I might be
18 entitled.

19 THE COURT: Right.

20 MR. MAHER: And in that case the person -- the
21 insurance company came and said, they didn't say me, and the
22 court said it doesn't matter. Same thing with these
23 assignments, Your Honor.

24 If you -- again, going over this just broad
25 brushed the 2008 assignment has an Exhibit A, and Exhibit A

1 specifically lists on page 6 American Bank. It specifically
2 lists on page 10 First Mortgage Corporation, Gateway Bank.
3 It specifically mentions on page 16 Republic State Mortgage
4 Company. That is sufficient as to those entities. All
5 right?

6 Then we move on, there is 2002 assignment, and
7 essentially it says the same thing except it says, for
8 everybody else who I have not already assigned previously to
9 this assignment agreement I assign those rights to you,
10 including, but not limited to, the people who are listed in
11 the exhibit to this one. Right?

12 And so if you look at the list here, Your Honor, I
13 mean literally there's thousands of them. There's thousands
14 of them. And it says to the extent we get any -- so this is
15 -- everybody else was assigned in 2012. And it says to the
16 extent we've omitted anybody we'll later on amend and
17 restate this one just to include it so nobody is any issue,
18 but everything was assigned whether they were listed or not,
19 correspondent lenders, and that is sufficient under the law,
20 Your Honor.

21 Now there were subsequent amended and restated
22 agreements that added to this list. It just -- same
23 agreement, it just said instead of ending at 3,853 it went
24 up to thousands more. And so in 2013 the amended
25 restatement adds group 2000 Real Estate Services, Inc. at

1 number 3859. And then in 2014, which is what Mr. Salter is
2 complaining about, it added similar people. Because there
3 are thousands of these people, Your Honor, you can't keep
4 track of every one.

5 THE COURT: But you're saying that those later
6 dated assignments were -- the assignments had already been
7 made at an earlier date.

8 MR. MAHER: Yes, exactly. It had been made in the
9 2012 assignment. All -- it says, and we can go through the
10 language if you like, I'm just doing this so you understand,
11 Your Honor -- that all their complaint said we're not
12 included and we weren't included, it's just not correct. It
13 doesn't matter for purposes of their motion because clearly
14 their motion doesn't satisfy Rule 60(b), I'm doing this so
15 that the Court understands it. We've done this as carefully
16 as we can. Lehman did this as carefully as they could and
17 they purported to try to list everybody so that you wouldn't
18 hear complaints from people like this saying I'm not somehow
19 listed on this document. All right?

20 So they added in 2014 as 3996 Director's Mortgage,
21 4169, Oaktree Funding, and 4239, Stearns Lending. That's
22 everybody who's here before you. Obviously some of them
23 were in 2008, some of them were added in the 2012, which are
24 subsequently amended and restated to specifically identify
25 them, but their not required to be specifically --

1 THE COURT: So you're saying it was an amendment
2 to specifically identify them as belt and suspenders for an
3 assignment that was affected from the first instance because
4 it spoke in general terms about all of -- particular
5 sellers.

6 MR. MAHER: Yes, Your Honor, exactly.

7 So all of these assignments that we're talking
8 about here today were either assigned in 2000 --
9 September 2, 2008 or February 13, 2012.

10 And again, in one of these decisions, Your Honor,
11 that we've cited to you in terms of the LBHI decisions there
12 is reference -- one of this things they said is the
13 Bankruptcy Court didn't know about any of this, there's a
14 specific order from Judge Peck allowing the bankruptcy
15 estate to do this, and it's cited in one of the cases, Your
16 Honor.

17 So all of this is completely in accordance with
18 what is required under the law, what the agreements
19 contemplated in terms of successors and assigns and
20 thereafter, whether it was done in 2008 and 2012, and
21 thereafter specifically adding people to be identified, but
22 in 2012 what was -- Your Honor, what was assigned -- have
23 agreed to assign any rights and remedies assignor may have
24 under the agreements with respect to the mortgage loans to
25 the extent such rights and remedies are assignable and the

1 assignor now wish to document that agreement, then they
2 hereby assign everything that hasn't been assigned
3 previously with respect to these entities.

4 Whether or not -- including, but not limited to,
5 the people who are listed on the exhibit. However, to the
6 extent we identify additional people and want to add them
7 we'll amend and restate.

8 So his statement, Your Honor, that these people
9 who are added for the first time a week before the ADR
10 notice is factually wrong. The assignment happened in 2012,
11 the documentation of it.

12 Now we have again four other arguments without the
13 documentation that we have properly assigned these rights
14 either elegantly under the seller's guide, under the terms
15 of the seller's guide by itself, or as a matter of conduct
16 in how Lehman Bank and LBHI conducted themselves. Because
17 of course it would make no sense for LBHI to take these
18 loans after having these extensive representations and
19 warranties happening two months later to buy this loan and
20 say, well, we don't care about these representations and
21 warranties.

22 Now that may get into certain fact issues that are
23 not before you today, Your Honor, but I want you to know
24 that we have five different arguments and ways, but you just
25 have to look at the assignment agreements and say as five,

1 six other courts have held these are clearly good under New
2 York law. They don't have a single case that says they're
3 not.

4 THE COURT: Okay. All right. Thank you.

5 MS. HENDERSON: Just for the record, Your Honor,
6 I'd like to clear up something that Mr. Maher indicated that
7 I was the client here in court today. I am co-counsel with
8 Blank Rome for Stearns Lending and Group 2000 and not a
9 client.

10 THE COURT: Okay.

11 MS. HENDERSON: So, I wanted to make sure that was
12 put on the record.

13 MR. MAHER: I never stated she was a client. I
14 don't even think I referred to you.

15 THE COURT: I think that was a misunderstanding.

16 MR. SALTER: I (indiscernible).

17 THE COURT: Yes, of course. You can have as many
18 as you like.

19 MR. SALTER: Okay. As to the -- and this is -- I
20 guess I'm missing it. Under the Rule 60(b) standard he's
21 saying, you know, we had these changes to bring it up. It
22 was counsel's -- co-counsel's own words that a lot of the --
23 we recognize the sellers may feel differently but that issue
24 is not before Your Honor. In fact nothing about the merits
25 of the indemnification claim is before the Court today.

1 So he's now saying we could have brought this up
2 there but we didn't. No, particularly we didn't --

3 THE COURT: But let me have you look at it -- let
4 me try to have you look at it a different way. When an ADR
5 is ordered -- procedure is ordered, as it has been in so
6 many aspects of this case and it's worked really, really
7 well, every -- virtually every claimant says I don't want to
8 do it, I don't belong here. I have a suit of cases in which
9 people say, there's no personal jurisdiction over me, let me
10 out of here. There are any number of defenses that people
11 have which they characterize in the nature of threshold
12 issues because they don't want to participate. Okay? The
13 last round it was the statute of limitations. Now this has
14 been put into this new bucket of improper assignment.

15 And let's be perfectly honest here. The single --
16 the biggest argument that you make is the non-recourse
17 argument. That's the biggest argument that you make is that
18 look, LBB could not have suffered any damages because it
19 sold the loans on a non-recourse basis. That's kind of the
20 big headline. Big headline. LBB sells, no recourse. It
21 could never have a claim, therefore there's nothing to
22 indemnify it for.

23 It just doesn't work. That's not what a non-
24 recourse transaction necessarily means. It just -- all that
25 that meant was that LBB was saying here it is, pushing it

1 across the table, and you can't come back against me. It's
2 got nothing to do with the assertion of rights that LBB had
3 and transferred.

4 Now if you want to get -- your argument is that
5 there is no valid assignment, then you're saying that, okay,
6 I disagree with you but I'm going to move on, then you're
7 saying that there was no valid assignment, right?

8 MR. SALTER: That's not our argument, but -- and
9 then as far as the --

10 THE COURT: What's not your argument?

11 MR. SALTER: That wasn't -- my -- our argument was
12 not that there was an invalid assignment, our argument was
13 that the assignment was -- did not assign anything
14 basically. When he --

15 THE COURT: Because it was non-recourse.

16 MR. SALTER: Because of the fact that we said to
17 you earlier and I didn't hear Counsel answer it, is what
18 about the fact that it's sitting on this side of the hallway
19 and it's worthless and now in 2012 your -- who owes Security
20 National? Oh, bring Security National across the hall, hey,
21 it's worth something.

22 THE COURT: That's exactly not what Counsel said.
23 That's not what Counsel said.

24 MR. SALTER: He didn't address the argument that
25 it --

1 THE COURT: Sure he did. He --

2 MR. SALTER: He said it was assigned in 2012,
3 which was after the loan was sold years later and -- you
4 know, so the assignment of rights and claims under the loan
5 purchase agreement occurred in 2012, years after the loan
6 was sold, in some cases years after the loan had defaulted.
7 At the time that assignment took place Lehman bank -- those
8 claims were worthless, that loan purchase agreement and the
9 rights and remedies in the hands of Lehman bank were
10 worthless. So in 2012 --

11 THE COURT: But your argument --

12 MR. SALTER: -- they executed the assignments to
13 give them worth in the hands of Lehman Brothers Holdings.

14 THE COURT: When did Lehman Bank sell the paper to
15 LBHI?

16 MR. SALTER: Between 2000 -- as to my clients
17 between 2004 and 2007.

18 THE COURT: But your position is that the moment
19 after LBB sold the paper on a non-recourse basis your
20 clients were off the hook.

21 MR. SALTER: That's a mischaracterization of our
22 position because of the holder of the note which the
23 appellate division said after notes are paid and
24 distinguished noteholder status cannot be retained. You
25 can't retain the noteholder. At one point they were a

1 noteholder.

2 THE COURT: See but this is the beauty of this
3 all, because during the statute of limitations argument when
4 I pointed out the fact that only the party that holds the
5 note or holds the claim can enforce it, right, that was
6 dismissed as not being compelled. Now you're telling me the
7 exact same thing as a reason why you should win.

8 MR. SALTER: I wasn't here for the statute of
9 limitations argument, Your Honor. It's just -- it changes
10 the damages. It changes the damages because it's
11 presupposing -- like Lehman Brothers Holdings' damages are
12 not a as a result of holding it.

13 THE COURT: I can sell the note and with it the
14 rights to enforce and separately retain other
15 indemnification rights and damage claims.

16 MR. SALTER: But Lehman Bank did -- so let's say
17 Lehman Bank did that. Lehman Bank sold the notes --

18 THE COURT: No, but it didn't, so let's --

19 MR. SALTER: Well how do we know that? We haven't
20 had -- I mean Counsel is saying he had, but we haven't had
21 discovery on any issue of these things that happened all
22 these times.

23 THE COURT: Right. So first you're going to go to
24 ADR --

25 MR. SALTER: Right.

1 THE COURT: -- and then after ADR if it doesn't
2 work you can take discovery and this is why there'll be a
3 trial.

4 MR. SALTER: I just wanted to get the distinction
5 between -- because they're not walking away from it because
6 the indemnification claims travel with the note. The holder
7 of the note changes as it passes down the line. It wasn't
8 that Lehman Brothers Holdings was left with this note in
9 their hands it went bad and now they had damages. Lehman
10 Brothers Holdings' damages are a as a result of them
11 assigning it and making their own separate promises.

12 Our originator did not encourage -- or I guess
13 there were warranties -- but they did not structure Lehman
14 Brothers Holdings --

15 THE COURT: You guess there were warranties? You
16 guess?

17 MR. SALTER: I wouldn't say they called them up
18 and said sell our loans, but I mean I could see how they
19 could say that they relied on it.

20 THE COURT: When these loans were originated there
21 were representations and warranties made.

22 MR. SALTER: Made to Lehman Brothers Bank.

23 THE COURT: Correct.

24 MR. SALTER: And --

25 THE COURT: But now --

1 MR. SALTER: -- two subsequent holders of the
2 note.

3 THE COURT: And to subsequent holders of the note.

4 MR. SALTER: They were a subsequent holder of the
5 note, it then was sold to somebody else. They are no longer
6 a subsequent holder of the note.

7 THE COURT: They were a subsequent holder then,
8 they're just not -- they may not be a holder of the note.
9 They did not lose their subsequent holding status.

10 MR. SALTER: So is the argument that they had --
11 you know, because this is -- the contract was drafted by
12 Lehman Bank. So when they're saying these are illusory
13 rights the originator did not draft this. So if Lehman Bank
14 drafted a contract which contained illusory rights I don't
15 think that is the fault of the party who didn't draft it
16 certainly. But --

17 THE COURT: But you're --

18 MR. SALTER: -- if they're saying -- basically
19 it's liability and perpetuity is what they're arguing.
20 They're saying that this contract --

21 THE COURT: We did this argument --

22 MR. SALTER: I wasn't --

23 THE COURT: -- I know, but you can't -- that
24 doesn't work. We did this argument at the statute of
25 limitations, and there are portions of cases that address

1 that argument.

2 There's no argument being made here that Lehman
3 slept on its rights. Okay? There -- the argument at the
4 statute of limitations it made clear that there was a
5 ephemeral window of time in which Lehman may have been able
6 to assert its rights. In fact it didn't exist. It didn't
7 exist.

8 MR. SALTER: Lehman's rights didn't exist.

9 THE COURT: Yes.

10 MR. SALTER: Lehman Bank.

11 THE COURT: Under -- if you put together the
12 position that you're taking today and the position that was
13 taken at the statute of limitations argument, the rights
14 that LBHI had to assert any claim relating to the breaches
15 of reps and warranties that occurred at origination never
16 actually existed. Never.

17 MR. SALTER: And I don't understand if -- why that
18 would be a problem for -- it's bad for Lehman Brothers
19 Holdings, I'm not sure why that's -- like I'm sure -- if
20 that's the result I'm not sure why it's an illogical result.

21 THE COURT: But this is a good point. I think it
22 would be kind of bad --

23 MR. SALTER: But --

24 THE COURT: -- for originators of thousands and
25 thousands of mortgages which were part and parcel of the

1 entire collapse of the market to now be taking the position
2 that they participated in a program in which it turns out
3 that all of the rights and reps and warranties they gave
4 were meaningless. I real don't think that that's a really
5 good position to be taking.

6 MR. SALTER: It's --

7 THE COURT: And the fact that Lehman Brothers Bank
8 and LBHI, for reasons that had nothing whatsoever to do with
9 the origination of the loans, decided to sell the loans on a
10 non-recourse basis somehow relieved the originators of their
11 responsibilities? That's not a really compelling argument.

12 MR. SALTER: I think it breaks the chain, I think
13 that we're never saying we're escaping liability to other
14 possible parties who might have -- the facts of how it
15 happened are how they happened. So it turned out that
16 Fannie Mae and Freddie Mac were holding the loans at the
17 time they defaulted.

18 THE COURT: Go back to the moment in time at which
19 LBB sold on a non-recourse basis. Is it or is it not your
20 argument that a moment after that non-recourse sale there
21 were no live reps and warranties on which LBHI could have
22 brought a claim?

23 MR. SALTER: No.

24 THE COURT: The next day.

25 MR. SALTER: No, it's not, because they would have

1 at that time have been the holder of the note and they could
2 have enforced the warranties as the holder of the note at
3 that time.

4 THE COURT: Okay.

5 MR. SALTER: It was only after they sold it.

6 And just the final thing, the standing ADR order
7 is subject to as you called the escape hatch, so as far as
8 the extraordinary circumstances the ADR -- you know, the
9 standing order says well we can go in front of the court and
10 we can try to get out of it. So that's the reason we're
11 here is because --

12 THE COURT: No that's not -- you're bringing --
13 you're not here under the escape hatch, you're here --
14 you're bringing a 60(b) motion for me to reconsider the ADR
15 order. I'm not reconsidering the ADR order.

16 The escape hatch was designed for unique
17 circumstances such as you got the wrong guy. You're trying
18 to make an argument that you got the wrong guy, but it's not
19 -- it's --

20 MR. SALTER: We're saying they're the wrong guy.
21 We're --

22 THE COURT: I understand.

23 MR. SALTER: Okay.

24 THE COURT: But --

25 MR. SALTER: Okay.

1 THE COURT: -- I think we're -- we've concluded.

2 Okay? The 60(b) motion the denied.

3 MR. MAHER: One last point if I might.

4 THE COURT: Yes.

5 MR. MAHER: I understand you're denying the motion
6 and you're directing them to ADR, I appreciate that.

7 It is absolutely --

8 THE COURT: Look, I'll say this to you, if you go
9 -- if you come into ADR and you get a -- you know, a
10 unanimous chorus of people saying that I am really losing
11 it, you ought to reconsider.

12 I mean I am -- I believe that I've come to the
13 right conclusion, but this is a -- this should be a living,
14 breathing process, and everybody should be working towards,
15 you know, the right result.

16 MR. MAHER: Fair enough, Your Honor.

17 The -- and I am loathe to impose upon you, Your
18 Honor; however, as you've seen from the statute of
19 limitations issue that you have definitively ruled on,
20 certainly at the hearing and you're going to have a
21 definitive ruling with respect to that --

22 THE COURT: Right.

23 MR. MAHER: -- they still don't accept it.

24 MS. HENDERSON: Your Honor, I'm going object. I
25 thought oral argument was over.

1 THE COURT: Well but now we're coming back to --
2 it is over -- but now we're coming back to the what are we
3 going to do going forward.

4 MR. MAHER: Right.

5 THE COURT: Because I have the specter of what's
6 going to happen next.

7 MR. MAHER: Right.

8 THE COURT: And I need to have some -- and the
9 burden is on you folks. I need some -- I need to have some
10 order here. I need to have some assurance that I'm not
11 going have to do this, you know, anymore times.

12 MR. MAHER: Well let me try to address that, Your
13 Honor.

14 THE COURT: All right.

15 MR. MAHER: And again, I'm loathe to put more of a
16 burden on you because I know you're very burdened with all
17 the things that are going on in this court, Your Honor;
18 however, it is crystal clear that you understand all of
19 these assignment issues perfectly.

20 If you could draft a brief order we could use that
21 in a ADR process to convince the counterparties that they I
22 are completely wrong and that they don't have to listen to,
23 you know, the people in Utah, the people in Arkansas,
24 they're listening to the bankruptcy judge who's overseeing
25 the ADR process.

1 THE COURT: Well --

2 MR. MAHER: So that would be extremely helpful to
3 Lehman.

4 THE COURT: -- why can't --

5 MR. SALTER: (Indiscernible) to make a formal
6 motion on objections there'd be issues with (indiscernible)
7 case, res judicata, collateral estoppel issues. I mean
8 basically you're saying take these to -- take these issues
9 to -- we're going mediation, take these issues to mediation.

10 He's saying well let's get a finding of fact and
11 we'll take all these issues up in the mediation.

12 THE COURT: No, no, no, hold on. Hold on.

13 MR. SALTER: Is that --

14 THE COURT: Hold on. This is a 60(b) motion.

15 MR. MAHER: Right.

16 THE COURT: That's all it is. So for the -- what
17 I can do is enter an order that says for the reasons stated
18 on the record the 60(b) motion is denied, and you can use
19 that transcript as a way of demonstrating, as you might to
20 other counterparties who wish to make similar arguments,
21 that you don't believe they're going to gain traction.

22 The problem that I have is that I can't -- due
23 process is due process, the parties aren't performing, I
24 can't bind them, this isn't a decision on the merits of a
25 motion to dismiss, but if you're going to go out and tell

1 people come back and try it again I'm going to be a really
2 unhappy person.

3 So you're objecting now and I want to know to what
4 end, what are you going to do?

5 MS. HENDERSON: Your Honor, I believe the
6 objection was that we didn't want it to be a fact-based
7 order from you indicating that a motion to dismiss if there
8 were an adversary proceeding brought after the ADR is over
9 that could then be used as law of the case res judicata,
10 we're not here to argue that. We're arguing a 60(b) motion
11 which has already been denied.

12 THE DEFENDANT: But I want to know --

13 MR. MAHER: What --

14 THE COURT: -- but as I said at the beginning I
15 want to know what's going to happen next?

16 MS. HENDERSON: We've already represented that the
17 only clients that we were here on behalf of are the only
18 clients that we have and this is the only motion that we had
19 intended to file.

20 MR. MAHER: Well, Your Honor, what I had been
21 suggesting --

22 THE COURT: Thank you.

23 MS. HENDERSON: You're welcome.

24 MR. MAHER: What I have been suggesting is that
25 you enter on order saying the 60(b) motion is denied because

1 it doesn't qualify for the extraordinary relief that a 60(b)
2 requires.

3 THE COURT: Right.

4 MR. MAHER: However in the alternative as I look
5 at the merits in terms of the assignment issue --

6 THE COURT: Oh, I'm not going do that.

7 MR. MAHER: Okay. All right.

8 THE COURT: I'm not going to do that. I mean it's
9 a 60(b) motion, we've gone very far towards --

10 MR. MAHER: Then we'll take the transcript.

11 THE COURT: -- the merits. I think that if these
12 claims ultimately came on for trial they would have a right
13 to put in their proof on the various theories. You say I've
14 got reasons why the assignments were valid --

15 MR. MAHER: Right.

16 THE COURT: -- right? And for the purposes at
17 least of what we're doing here today I don't find that
18 anything that anyone said compels me to revisit under 60(b),
19 the ADR order.

20 What ultimately might happen I don't know. I mean
21 you've heard my preliminary views, but I don't know. So --

22 MR. MAHER: Very well, Your Honor.

23 THE COURT: But what -- there are hundreds more of
24 these parties out there, so I'd like to know how are we
25 going to control this? What's going happen?

1 MR. MAHER: You know, obviously we cannot control
2 counterparties who choose to file motions or do whatever it
3 is that they do.

4 THE COURT: So let's talk about -- let's put to
5 one side the non-recourse, the assignment issue, okay?
6 Let's talk about the statute of limitations.

7 I'm going to publish a decision that denies the
8 motion to dismiss. What I'd like to do is have it be one
9 decision but covers both of the parties.

10 MR. MAHER: Yeah.

11 THE COURT: Separate sections on the facts. Any
12 problem with that?

13 MS. HENDERSON: No, Your Honor, I would just alert
14 Your Honor that Home Trust's complaint was for declaratory
15 relief, so it's a little different than CNN's complaint for
16 contractual indemnification. So, I would just point that
17 out to Your Honor.

18 THE COURT: Right. But --

19 MR. MAHER: It doesn't matter for purposes of the
20 motion to dismiss, Your Honor.

21 THE COURT: Right. For purposes of just deciding
22 the legal issue of a statute of limitations.

23 MS. HENDERSON: If you're asking then we don't
24 object, they were both argued concurrently.

25 THE COURT: They were, right. I'm just trying to

1 be efficient. And then I'm just trying to figure out what's
2 going happen next.

3 Are you going to -- we had a whole back and forth
4 over appellate rights, which have been preserved. You were
5 of the view that this was a stalling tactic by LBHI, I think
6 I convinced you that it was not. This will come out
7 shortly.

8 What -- is there going to be an attempt to appeal
9 it? What's going happen? Are folks going to go to ADR?

10 MR. MAHER: Your Honor, in terms of what's
11 happened here thus far --

12 THE COURT: Yeah.

13 MR. MAHER: -- we tentative dates scheduled with
14 some of the parties here --

15 THE COURT: Okay.

16 MR. MAHER: -- that are here before you for ADR
17 within the next month in the event that Your Honor denied
18 the motion as you have.

19 THE COURT: Okay.

20 MR. MAHER: So for those counterparties we're
21 going to be going to mediation in the next let's say month
22 or two on agreed dates after the date -- they were scheduled
23 after the date of this hearing so that, you know, with the
24 understanding --

25 THE COURT: Okay.

1 MR. MAHER: -- if you denied it we'd be going to
2 ADR on those issues.

3 I don't know -- separately I don't know what
4 they're intending to do on your statute of limitations
5 ruling. I'm not clear what their rights are at this
6 point --

7 THE COURT: I --

8 MR. MAHER: -- and that's for them to determine.

9 THE COURT: Right. Okay.

10 MS. HENDERSON: Just to be perfectly clear, those
11 matters are not before the Court at this moment, Judge, that
12 there's been no decision made. We're waiting to see what
13 your ruling says. We're here on Apex and American Bank and
14 Director's, not Home Trust and CNN at this time, Your Honor.

15 MR. MAHER: We're confident your ruling would be
16 upheld if it were appealed, Your Honor.

17 THE COURT: Okay. Okay. I'm not trying -- I'd
18 like to as much as possible control my docket and not have
19 to have multiple rounds of the same thing. But it is what
20 it is, and if you would share -- if you would draft an order
21 along the lines that we've talked about and share it with
22 all the parties and then you can get a transcript of this
23 hearing and you can annex it as an exhibit that works for
24 me.

25 MR. MAHER: Yes, Your Honor.

1 THE COURT: All right? All right.

2 MR. SALTER: Thank you, Judge.

3 MS. HENDERSON: Thank you, Your Honor.

4 THE COURT: Thank you.

5 (Whereupon these proceedings were concluded at 3:19 PM)

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I N D E X

RULINGS

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Pursuant to Rule 9019 of the Federal Rules of	
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C E R T I F I C A T I O N

I, Dawn South, certify that the foregoing transcript is a
true and accurate record of the proceedings.

Dawn South

Digitally signed by Dawn South
DN: cn=Dawn South, o, ou,
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Date: 2015.05.06 14:31:53 -04'00'

Dawn South

AAERT Certified Electronic Transcriber CET**D-408

Date: May 6, 2015

Veritext Legal Solutions

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